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IN THE COURT OF APPEALS OF INDIANA

BOBBIE L. GREEN,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 63A04-0806-CV-350
	)	
RUSSELL E. GREEN,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE PIKE CIRCUIT COURT
The Honorable Jeffrey L. Biesterveld, Judge
The Honorable Joseph L. Verkamp, Referee
Cause No. 63C01-0710-DR-329

January 12, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Bobbie Green appeals the trial court's order in this dissolution proceeding awarding Russell Green custody of the couple's child, T.G.; requiring Bobbie to pay child support; and distributing property. On appeal, Bobbie raises three issues, which we restate as: (1) whether the trial erred when it granted primary physical custody of T.G. to Russell; (2) whether the trial court erred in its calculation of child support; and (3) whether the trial court erred in its distribution of property. Concluding the trial court committed no error, we affirm.

Facts and Procedural History[1]

Bobbie and Russell were married on July 4, 1997. Their only child, T.G., was born on May 17, 1997. At the time of their marriage, Russell worked as a police officer. However, Russell was injured in the line of duty in late November of 2004. Russell's injuries left him permanently disabled, and he began collecting a police disability pension.[2] Subsequently, Bobbie and Russell relocated from Merrillville, Indiana, to their present marital residence in Petersburg, Indiana. The marital residence sits on approximately fifty acres of reclaimed strip mining land. Bobbie and Russell keep many animals on the land including horses, cattle, cats, and dogs. T.G. has emotional attachments to at least one of the horses and one of the cats.

[1] The statement of facts in an appellate brief should be a narrative statement of facts stated in the light most favorable to the judgment and should not be argumentative. Indiana Appellate Rule 46(A)(6); Curtis v. Clem, 689 N.E.2d 1261, 1262 n.1 (Ind. Ct. App. 1997). Neither party in this case has submitted an accurate statement of facts. Rather, each party has presented the facts in the light most favorable to that party, which has made our review of this case much more difficult.

[2] Russell receives his disability pension tax-free. At age fifty-five, his disability pension ceases and Russell will receive a regular retirement pension of an unknown amount, from which taxes will be withheld.

Bobbie works as a registered nurse at Deaconess Hospital in Evansville. Bobbie works three twelve-hour shifts per week scheduled in six week increments. From 2007 until just prior to the trial court's final hearing in this matter, Russell worked as a dispatcher for the Pike County Sheriff's Department. Bobbie and Russell each submitted child support obligation worksheets to the trial court, both of which listed their respective weekly incomes as $996.00 and $712.00.

Bobbie has a single child from a previous marriage, T.P. Bobbie shares legal custody of T.P. with T.P.'s father, but is not obligated by court order to pay child support for T.P. Although T.P.'s father has primary physical custody, Bobbie exercises regular parenting time with T.P. After Bobbie and Russell relocated to Petersburg, T.P. began living with the couple on a regular basis. Russell and T.P. maintained a good relationship throughout much of that time. However, just prior to the couple's separation, Russell and T.P. had a verbal fight and T.P. returned to live with her father. Since that time, T.P. has stayed with her mother on numerous occasions and on a couple of occasions has spent time with Russell.

Russell has two children from a previous marriage. Russell does not have legal custody of the two children, nor does he exercise visitation or parenting time.[3] Russell pays child support for his children in the amount of $105.00 per week plus $15.00 per week toward the repayment of an arrearage.

Prior to their separation, both Russell and Bobbie shared parenting responsibilities

[3] The record does not disclose whether Russell is entitled to parenting time or visitation pursuant to a child custody order, but the record is clear that Russell has not seen his other two children for many years.

with regard to T.G. Since their separation, T.G. has primarily resided with Russell at the marital home. At the time of the trial court's final hearing, Bobbie was living with her boyfriend, and T.G. had spent several nights there with Bobbie. The parties agreed to provisional orders granting Bobbie fifty percent parenting time in alternating increments of three days and four days per week.[4] Both parties presented self-serving testimony as to who or what caused Bobbie to see T.G. far less than fifty percent of the time prior to the trial court's final hearing.[5]

Beginning around July of 2007, Russell began to suspect Bobbie of infidelity. Thus began a series of physical and verbal altercations between the two. On July 21, 2007, following a physical fight, Bobbie took T.G., who had been at a friend's house, and went to

[4] Counsel are reminded that Indiana Appellate Rule 50(A)(2) requires the parties to submit appendices which include, inter alia, "the appealed judgment or order, including any written opinion, memorandum of decision, or findings of fact and conclusions thereon relating to the issues raised on appeal … [and] pleadings and other documents from the Clerk's record in chronological order that are necessary for resolution of the issues raised on appeal." The chronological case summary lists several documents that would have been helpful to our review but that neither party submitted, including: the petition for dissolution, agreed provisional orders, application for citation of contempt, and motions to correct error and to reconsider. The omission of these documents also made our review of this case more difficult.

[5] Much of the parties' hearing testimonies, statements of facts, and arguments consist of conflicting, one-sided views of events in the couple's marriage, e.g. appropriateness of disciplinary action, treatment of animals, instigation and level of altercations between the parties, etc. It is the trial court's job to judge the credibility of the witnesses and we will not reweigh the evidence or reassess the credibility of the testimony. Leonard v. Leonard, 877 N.E.2d 896, 900 (Ind. Ct. App. 2007).

> The trial court has before it, within its sight and hearing, the physical presence of the parties and oftimes their children. It hears their testimony, notes their actions and reactions, observes their sincerity, emotions, inflections and tones of voice, apparent state of health, and experiences the tenseness of the human drama enacted there within the confines of the court room. The appellate tribunal, on the other hand, has before it only the cold, written record. It sees only words, phrases, sentences, questions, answers, and exhibits. It is without the authority to weigh the evidence and determine(s) only that the requisite principles of law have been observed and duly applied, and that justice has been fairly and impartially administered.

Blue v. Brooks, 261 Ind. 338, 341, 303 N.E.2d 269, 271 (1974) (citation omitted). As such, we recite the facts as required by our standard of review in a light most favorable to the trial court's judgment

Bobbie's parents' house. Later that night, Russell phoned Bobbie and made her believe he had attempted suicide by firing a shotgun into the water. After Bobbie and the police arrived, Russell agreed to admit himself to inpatient treatment at Cross Pointe psychiatric facility. Russell was diagnosed with depression and post-traumatic stress disorder and given a prescription for medication. After seven days, Russell was discharged and returned home after a brief stay with his father. Russell does not currently take his prescribed medication.

On one occasion after the parties' separation, Bobbie picked up T.G. at the marital residence. While Bobbie and T.G. sat in Bobbie's car, Russell and Bobbie engaged in a verbal argument. During the argument, Russell hit Bobbie's car with his fist resulting in a small dent.

Since the parties' separation, Russell has fallen behind on mortgage payments on the marital residence. Prior to the final hearing, Russell contacted the mortgage company and made arrangements to repay the past-due amount in installments.

Russell filed a petition for dissolution of marriage on October 19, 2007. Prior to the final hearing, the trial court interviewed T.G. privately in chambers. Neither party nor their counsel were present for the interview, and no transcript of the interview is included in the record. The trial court held a hearing on February 15 and 22, 2008, and issued its order and decree of dissolution on March 4, 2008. Bobbie filed a motion to correct error and to reconsider on March 25, 2008. The trial court held a hearing on the motion on April 25, 2008, and denied the motion, apparently without a written order, on May 22, 2008.[6] Bobbie

[6] Neither party submitted a written order in the appendix, nor does the chronological case summary indicate an entry in the record of judgments and orders.

now brings this appeal.

Discussion and Decision

I. Custody of T.G.

Child custody decisions "fall squarely within the discretion of the trial court and will not be disturbed except for an abuse of discretion." Liddy v. Liddy, 881 N.E.2d 62, 68 (Ind. Ct. App. 2008) (quoting In re B.H., 770 N.E.2d 283, 288 (Ind. 2002)). An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before it or the reasonable inferences drawn therefrom. Id. In the present case, the trial court had a substantial amount of contradictory evidence before it. We will not substitute our judgment for that of the trial court, and we will not re-weigh the evidence or judge the credibility of the witnesses. Leonard, 877 N.E.2d at 900. Therefore, we may not reverse the trial court's decision simply on the basis of conflicting evidence. In re Marriage of Julien, 397 N.E.2d 651, 653 (Ind. Ct. App. 1979).

The trial court shall determine custody in the best interests of the child with no presumption favoring either parent. Ind. Code § 31-17-2-8. In making its determination, the trial court may choose to interview the child privately in chambers to ascertain the child's wishes. Ind. Code § 31-17-2-9. In determining the best interests of the child, the trial court shall consider all relevant factors including: (1) the age and sex of the child; (2) wishes of the child's parents; (3) wishes of the child; (4) interaction and relationship between the child and the child's parents, siblings, and other significant persons; (5) the child's adjustment to home, school and the community; (6) the mental and physical health of all individuals involved; and

(7) evidence of a pattern of domestic or family violence. Ind. Code § 31-17-2-8. The trial court is not limited to consideration of the statutory factors, but may consider all relevant factors bearing upon the best interest of the child. In re Marriage of Saunders, 496 N.E.2d 419, 421 (Ind. Ct. App. 1986). The crucial consideration in any child custody determination is the best interests of the child. Id.

Most of the factors weigh neutrally between physical custody being granted to Bobbie or Russell. Both expressed a desire to have custody of T.G. Both seem to have good relationships with T.G. Because the parties current residences are only a couple of miles from one another, the impact on T.G.'s adjustment to home, school, and community is minimal as is the impact on T.G.'s ability to maintain relationships with significant others such as her step-sister, T.P., and her grandparents. Although the trial court did not disclose T.G.'s wishes, we have no reason to believe the trial court did not properly factor those wishes into its decision.

With respect to the remaining factors, age and sex of the child, physical and mental health of the individuals involved, and pattern of domestic or family violence, Bobbie's argument amounts to a request that we re-weigh the evidence and re-judge the credibility of the testimony. This we will not do. The trial court heard the testimony from Bobbie, Russell, Russell's mother, and T.P. and interviewed T.G. in chambers. The testimony presents conflicting evidence at best and it is the job of the trial court, not this tribunal, to make "Solomon-like decisions in [such] complex and sensitive matters." Trost-Steffen v. Steffen, 772 N.E.2d 500, 509 (Ind. Ct. App. 2002) (quoting Speaker v. Speaker, 759 N.E.2d 1174,

1179 (Ind. Ct. App. 2001)). We discern no abuse of discretion in the trial court's custody decision, but rather a permissible credibility determination. See id.

II. Calculation of Child Support

A trial court's calculation of child support is presumptively valid, and we will reverse only if the calculation is clearly erroneous or contrary to law. Young v. Young, 891 N.E.2d 1045, 1047 (Ind. 2008). A calculation is clearly erroneous only when it goes against the logic and effect of the facts and circumstances before the trial court. Id. "If the trial court's income figure includes the income required by our Child Support Guidelines and 'falls within the scope of the evidence presented at the hearing,' the trial court's determination is not clearly erroneous." Eppler v. Eppler, 837 N.E.2d 167, 173 (Ind. Ct. App. 2005) (quoting Naggatz v. Beckwith, 809 N.E.2d 899, 902 (Ind. Ct. App. 2004), trans. denied).

Bobbie argues that the trial court erred when it calculated child support because it failed to account for the fact that Russell's disability pension is non-taxable and failed to give her sufficient overnight credit. Weekly gross income for purposes of a child support calculation includes, by definition, income from disability insurance payments and pensions. Ind. Child Support Guideline 3(A)(1). Under the gross income shares model used to calculate child support in Indiana, a tax factor of 21.88 percent is factored into the calculation. Child Supp. G. 1, Commentary. A trial court may choose to deviate from the guideline where the taxes vary significantly from the assumed rate of 21.88 percent. Id.

The Child Support Guidelines give the trial court discretion to deviate from the guideline calculation of child support where the actual taxes vary substantially from the

assumed rate. Bobbie has cited no authority, and we have found none, requiring a trial court to factor in a significantly different tax rate than that assumed by the guidelines. In addition, both parties submitted child support obligation worksheets to the trial court listing Russell's weekly gross income as $712.00, and the trial court utilized this figure in its calculation of child support.[7] Therefore, the evidence in the record supports the trial court's calculation of child support. Further, any error that may have occurred was invited by Bobbie in her submission of the proposed child support obligation worksheet. See Batterman v. Bender, 809 N.E.2d 410, 414 (Ind. Ct. App. 2004) (husband could not complain of error where trial court made child support retroactively effective based upon agreement of parties).

With respect to overnight credits, the trial court ordered parenting time to Bobbie pursuant to the parties' agreement or, in the absence of an agreement, according to the Parenting Time Guidelines. The commentary to Child Support Guideline 6 states that a parent exercising parenting time according to the basic Parenting Time Guidelines will have 98 overnights per year. In its calculation of child support, the trial court gave Bobbie credit for 86-90 overnights annually. The Child Support Guidelines give the trial court discretion to award a parenting time credit to the non-custodial parent. Child Supp. G. 4(G)(4). In addition, Bobbie submitted a child support obligation worksheet to the trial court listing the number of overnights as 90, and Russell submitted a worksheet listing the number of overnights as 86-90. The trial court utilized the exact numbers submitted by the parties in its

[7] The figure of $712.00 includes income derived from Russell's prior job as a dispatcher for the Pike County Sheriff's Department. At the hearing, Russell testified that he understood he would need to obtain new employment in order to meet his financial responsibilities. Thus, the figure reflects not only Russell's actual current income from his disability pension, but also his potential income.

own child support calculation. Therefore, the evidence in the record supports the trial court's calculation. Further, any error that may have occurred was invited by Bobbie in her submission of the proposed child support obligation worksheet. See Batterman, 809 N.E.2d at 414. As a result, the trial court did not abuse its discretion in calculating the amount of child support.

III. Distribution of Property

Bobbie does not argue that the trial court failed to equitably distribute the marital property in its entirety. Rather, Bobbie challenges four specific items in the trial court's order: the award of the marital residence to Russell; the award of the horses to Russell; failure to provide a remedy to Bobbie should Russell default on the mortgage loan on the marital property; and failure to award Bobbie a share of Russell's vested retirement pension.

The division of marital assets is a matter within the sound discretion of the trial court, and we apply a strict standard of review to a trial court's division of marital property. Hill v. Bolinger, 881 N.E.2d 92, 94-95 (Ind. Ct. App. 2008), trans. denied. A party challenging the trial court's division of marital property bears the burden of proof and must overcome one of the strongest presumptions applicable to our considerations on appeal. Id. at 95. We will reverse a property distribution only if there is no rational basis for the award. Id.

A. Marital Residence

Bobbie argues the trial court erred when it awarded the marital residence to Russell. Bobbie argues that, at the time of the final hearing, Russell was behind on the mortgage payments and had insufficient funds to service the debt. As a result, Bobbie argues that the

marital residence should have been awarded to her or else sold with the proceeds divided between the parties. Bobbie cites no authority to support her argument. An argument that is not supported by cogent reasoning and citation to authority as required by Indiana Appellate Rule 46(A)(8)(a) is waived. Smith v. Smith, 854 N.E.2d 1, 5 n.3 (Ind. Ct. App. 2006). In any event, Russell presented evidence that he had contacted the mortgage company and made arrangements to repay his past due debt and return his account to good standing. Russell also indicated his understanding of the need for and willingness to find new employment to supplement his income. Finally, since the trial court granted primary physical custody of T.G. to Russell, it is logical for the trial court to award the marital residence to Russell as well so that T.G. can continue to reside in her own home. Therefore, Bobbie has failed to demonstrate that the trial court abused its discretion in awarding the marital residence to Russell.

B. Horses

Bobbie next argues the trial court erred when it awarded the horses to Russell stating that "because [the horses] are living beings, they cannot be distributed in the same manner as personal property." Brief of Appellant at 21. Bobbie argues that the trial court should "take into consideration the relationship the animal has with the various parties, as well as the needs of the animal and the likelihood that one of the parties will be better able to financially care for it." Id. Bobbie cites no authority to support her arguments and the rule of waiver discussed above applies here as well. In addition, the law is clear that animals are personal property subject to distribution by the trial court. See Forbar v. Vonderahe, 771 N.E.2d 57,

58 n.1 (Ind. 2002) (affirming trial court's division of property including horses despite conflicting evidence of the horses' true ownership); Lachenman v. Stice, 838 N.E.2d 451, 467 (Ind. Ct. App. 2005) ("However unfeeling it may seem, the bottom line is that a dog is personal property . . . ."). The evidence in the record demonstrates that the marital residence was attached to the area where the horses normally resided. Although Russell had relocated the horses to better pasture land, he also indicated that this move was temporary and he would be bringing the horses back home in the future. Therefore, the trial court did not abuse its discretion in awarding the horses to Russell.

C. Remedy for Default on the Mortgage

Third, Bobbie argues that the trial court failed to provide her with a remedy in the event Russell defaulted on the mortgage on the marital residence. Bobbie suggests that the trial court should have inserted a hold harmless clause into its order or required Russell to refinance the mortgage in his own name. Bobbie cites no authority to support her arguments and the rule of waiver discussed above applies here as well. In addition, the trial court's order does not leave Bobbie without a remedy should Russell default on the mortgage.

The trial court ordered that Russell "shall become the sole and exclusive owner of said marital real estate subject to the mortgage owed to Home Building Savings Bank and insurance and taxes thereon." Br. of Appellant, Order at 2. In its division of the debt of the marriage, the trial court assigned payment of the mortgage loan to Russell. Id. at 4. Finally, the trial court ordered "the parties [sic] … debt and property shall be divided as stated above." Id. at 6. Because Russell's duty to repay the mortgage loan constitutes a part of the

division of property rather than a direct order to pay a fixed sum to Bobbie, Bobbie may enforce the court's order through an action for contempt. See Phillips v. Delks, 880 N.E.2d 713, 720 (Ind. Ct. App. 2008) (affirming trial court's finding of contempt where husband failed to immediately cure deficiencies on rental property mortgages as required in dissolution decree); Mitchell v. Mitchell, 871 N.E.2d 390, 395-96 (Ind. Ct. App. 2007) (remanding with instructions for trial court to enter finding of contempt where husband failed to pay and hold wife harmless from payment of mortgage debt); Dawson v. Dawson, 800 N.E.2d 1000, 1003-04 (trial court may use its contempt power to enforce an order requiring husband to satisfy second mortgage on marital residence). Therefore, Bobbie is not without remedy should Russell default on the mortgage, and she has demonstrated no abuse of discretion.

D. Russell's Vested Pension

Finally, Bobbie argues that the trial court should have directed Russell to pay her fifty percent of his pension payments upon receipt. Although Bobbie is correct that vested retirement pension benefits are considered part of the marital estate, she is incorrect that this fact requires the court to divide the benefits equally. See Coffey v. Coffey, 649 N.E.2d 1074, 1077 (Ind. Ct. App. 1995) ("Having said that William's pension benefit is part of the 'marital pot,' … [c]learly, the court was not required to split the pension 50-50 between William and Doneta."). A trial court is required to divide all marital property in a "just and reasonable manner." Id. The trial court awarded Russell his own retirement pension benefits and awarded Bobbie her own 401(k) retirement funds. Bobbie did not present any evidence of

the estimated value of Russell's pension or that such value is not reasonably equal to the value of her own 401(k) account. Thus, Bobbie has failed to present any evidence that the award is not just and reasonable. Therefore, the trial court did not abuse its discretion in awarding Russell his retirement pension benefits.

Conclusion

The trial court did not err when it granted primary physical custody of T.G. to Russell, calculated the amount of child support, or distributed the marital property between Russell and Bobbie.

Affirmed.

CRONE, J., and BROWN, J., concur.